Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1691

PAUL I. GUEST, ET AL., APPELLANTS

v.

F. EMMETT FITZPATRICK, ET AL.

No. 75-1698

THE WILLIAMSPORT HOSPITAL, ET AL., APPELLANTS

v.

F. EMMETT FITZPATRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANSWER OF APPELLEES TO SUGGESTION OF MOOTNESS IN No. 75-1698

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February 4, 1977

Answer of Appellees to Suggestion of Mootness in No. 75-1698

1. Appellees oppose Appellants' Suggestion of Mootness[1] in No. 75-1698, which (although the point is nowhere discussed in appellants' filing) would unjustifiably strip the Commonwealth of Pennsylvania and other appellees of an extremely important public benefit which they have derived from the judgment of the District Court.[2]

2. The District Court by a divided vote (J.S. in No. 75-1691 at A-16, A21-23, A26-27) upheld the validity of Act No. 94 insofar as it applied to the preexisting contract between The Williamsport Hospital ("Williamsport") and Hospital Services Association of Northeastern Pennsylvania, Inc. ("Northeastern Blue Cross"), a

[1] Appellants filing is styled "Answer to Motions To Dismiss No. 75-1691 Based Upon Mootness And To Affirm No. 75-1698 Based Upon Intervening Circumstances." Since it raises for the first time in this Court an issue as to the alleged mootness of No. 75-1698, the filing will be referred to herein as "Appellants' Suggestion of Mootness" or "Appellants' S.M.".

[2] Appellees are frankly mystified as to the substantive ground for the related suggestion that appellants in No. 75-1691 be admitted to argue in No. 75-1698. Although Appellants' Suggestion of Mootness (¶3 at 4) vaguely refers to "a possible conflict between Act 94 and the 1976 Hospital Agreement as a result of which the Act may continue retroactively to deny certain DVHC hospitals rights which they had had before the enactment of Act 94", appellants are not able to point to even *one* specific example of such a problem, and appellees, after months of negotiations over just such questions culminating in the 1976 Hospital Agreement, are similarly unaware of any issue arising during the retroactive period overlooked by the comprehensive settlement which is now memorialized by the 1976 Hospital Agreement (discussed in the Motions of appelles referred to in note 1, *supra*). Indeed, appellants' unqualified concession (Appellants' Suggestion of Mootness ¶1) that No. 75-1691 is moot necessarily confirms this fact. Since appellants in No. 75-1691 have already filed their briefs in this Court, appellants' suggestion on this score reduces to a request that the usual rule against oral argument by *amicus* be waived as to them.

contract which was in existence on the August 2, 1975 effective date of Act No. 94. By reason of appellants' concession of mootness in No. 75-1691 (Appellants' S.M. ¶ 1), the most challenging issue in these cases (*i.e.*, the validity of the contract reinstatement approach taken by Act No. 94 as to the appellants in No. 75-1691) has now disappeared. In light of this development Williamsport appears to have lost confidence in the substantiality of its attack on the judgment of the District Court, and now seeks to evade the bar of that judgment by suggesting that the Williamsport-Northeastern Blue Cross contract (Attachment A to Appellants' S.M.) has been superseded by a new contract effective July 1, 1976, mooting Williamsport's challenge to the validity of Act No. 94 (Appellants' S.M. ¶ 2).[3]

[3] Williamsport's co-appellant, The Hospital Association of Pennsylvania ("HAP"), seeks to evade the bar of the judgment below by suggesting (Appellants' S.M. at 1 n.1, 4 n.4) that it is an appellant solely in its own behalf and not as a representative of its members (which members include hospitals contracting with appellee Blue Cross of Greater Philadelphia and with Northeastern Blue Cross as well as hospitals contracting with other Blue Cross plans in the Commonwealth of Pennsylvania). HAP expressly brought this action on behalf of its members ("DVHC and HAP are organizations whose members are also members of the plaintiff hospital class within their respective geographic areas." Amended Complaint ¶ 1, Appendix at 27). In such circumstances, the association clearly has standing as the representative of its members. *Boston Stock Exchange* v. *State Tax Comm'n* CCH Supreme Court Bulletin at B 616 n.3 (January 12, 1977). Thus, even if this Court were to conclude that Williamsport's special circumstances mooted its individual claims, there clearly remains a "live controversy" as to the impact of Act No. 94 on existing and future contracts, and the failure to certify HAP as the representative of a class concerned with these issues will not moot the appeal in this Court. See *Craig* v. *Boren*, CCH Supreme Court Bulletin at B414-B415.

3. There are obvious problems with an assertion that the automatic operation of a renewal clause of a Blue Cross-hospital contract moots any Act No. 94 aggrievement which a hospital in Pennsylvania might have. For example, the principal effect of Act No. 94, if valid, would be to impair the previously unrestricted freedom of a hospital such as Williamsport to denounce the existing Williamsport-Northeastern Blue Cross arrangement at renewal time. Moreover, the alleged "new" contract was never approved by the Pennsylvania Insurance Department as required by 40 Pa.C.S. § 6124(a).

4. In any event, however, this Court need not pursue the foregoing inquiry, for in thus seeking to avoid the Scylla of one nonmoot issue (as to the effect of Act No. 94 on Blue Cross-hospital contracts existing on August 2, 1975), Williamsport has been swept into the Charybdis of a second and clearly nonmoot issue which it has most carefully presented and preserved. This second issue concerns the effect of Act No. 94 on *future* Blue Cross-hospital contracts (*i.e.*, contracts made after the August 2, 1975 enactment of the statute).

5. In Count II of the Amended Complaint in the District Court, Williamsport challenged the validity of Act No. 94 under the Equal Protection Clause insofar as the statute would apply to "future agreements" between, *inter alia*, Williamsport and North-

eastern Blue Cross (Appendix at 36-37 ¶¶ 21-26). The District Court reached the issue thus presented and, although divided on other aspects of the case, unanimously upheld the statute in its future aspects (J.S. in No. 75-1691 at A21-A23, A27). In this Court, Williamsport fully presented the issue in its Jurisdictional Statement (J.S. in No. 75-1698 at 18-19).

6. To be sure, Williamsport ultimately concluded that its attack on the prospective application of Act No. 94 was so patently frivilous that it could not responsibly be advanced in this Court, and with commendable candor abandoned the point ("Prospectively, the . . . statute is constitutional. . . ." Brief in No. 75-1698 at 14). Of course, the considerations typified by *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), are designed to protect an appellant who challenges a judgment below, but who finds his approach to review and hoped-for reversal in this Court frustrated by intervening events which undermine the constitutional basis of this Court's jurisdiction. In the instant action, on the other hand, this Court continues to be faced with a justiciable case or controversy between Williamsport and appellees as to the validity of Act No. 94 insofar as post-August 2, 1975 Blue Cross-hospital contracts are involved. Only Williamsport's perception of the substantiality of that question has changed during the course of this litigation.

7. Here, then, we discern the apparent motive for the extraordinary circumstance of an appellant, in a case where jurisdiction has been noted and the case fully briefed in this Court, pressing the issue of mootness. If Williamsport had perceived after judgment below that its challenge to the prospective application of Act No. 94 was insubstantial, it presumably would not have appealed, and the judgment would be *res adjudicata* as to it. Similarly, if Williamsport were now to dismiss unilaterally under Rule 60, the judgment below would be unaffected.[4] Only by persuading this Court to misapply *Munsingwear* can Williamsport (it having conceded in this Court that there is no merit to its attack on the judgment below) hope to escape the *res adjudicata* effect of the judgment of the District Court.

8. The danger to the public interest in the Commonwealth of Pennsylvania presented by Williamsport's facile maneuver is by no means fanciful. By Williamsport's own calculations, it is facing within a few weeks (*i.e.*, on April 2, 1977) another deadline for the annual renewal of its contract with Northeastern Blue Cross. If Williamsport succeeds in obtaining a gross misapplication of *Munsingwear* in this case, Williamsport will be free, should it so choose, to purport to denounce

[4] In view of the public nature of the question involved appellees have offered to waive all claim against appellants for costs here and below if the judgment of the District Court is permitted to stand in consequence of unilateral dismissal under Rule 60.

its existing contract with Northeastern Blue Cross and to begin a whole new round of litigation challenging the validity of Act No. 94 as to it. Nothing in the precedents of this Court, nor any concept of justice or sound judicial administration, requires that Williamsport, having brought its claim to the eve of oral argument in this Court, now be permitted to retire at its whim to relitigate the claim, in perhaps another forum,[5] on another day.

Respectfully submitted,

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[signatures continued on next page]

[5] While these cases arise from judgments of the United States District Court for the Eastern District of Pennsylvania, Williamsport's hospital facilities are located in the Middle District of Pennsylvania.

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